IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 18TH JUNE 2007 / 28TH JYAISHTA 1929

SA.No. 119 of 1994(E)

AGAINST THE JUDGMENT & DECREE IN A.S.NO.81 OF 1988 OF THE PRINCIPAL SUB COURT, ATTINGAL
OS.191/1986 of the MUNSIFF'S COURT,VARKALA
.....

APPELLANT/APPELLANT/DEFENDANT:

ISMAIL PILLAI MOHAMMED HANEEFA,
THENGUMPURA PUTHEN VEEDU,
KARAYAKKONAM, KUDAVOOR DESOM,
NAVAIKULAM VILLAGE.

BY ADV. SRI.P.RAMESAN

RESPONDENT/RESPONDENT/PLAINTIFF:

MOHAMMEDALI VAIDYAN IBRAHIM KUNJU VAIDYAN,
POIKAVILA VEEDU, VALIYAPURA, KANYANKONAM,
KUDAVOOR DESOM, NAVAIKULAM VILLAGE.

R1 BY ADV. SRI.G.UNNIKRISHNAN

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 18/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR, J.

.....

S.A.No. 119 OF 1994

.....

DATED THIS THE 18th DAY OF JUNE, 2007

JUDGMENT

When a defendant fails to produce a document as directed by the court in an application filed by the plaintiff whether his defence could be struck off under Rule 21 of Order XI of Code of Civil Procedure ? Even if the defence is struck off can the court deny the defendant his right to cross examine the witnesses examined on the side of plaintiff ? These are the substantial questions of law to be decided in the second appeal.

2. Respondent instituted the suit before Munsiff Court, seeking a decree for injunction. Appellant, the defendant filed a written statement disputing the right and possession claimed by respondent. Trial court framed necessary issues. Respondent filed I.A.837 of 1987 purporting to be under Rule 11 of Order XI seeking an order directing appellant, defendant to produce the original of the registered sale deed which is claimed to be in his possession. Trial court directed appellant to produce the original sale deed. Appellant did not produce the document. Thereafter respondent filed I.A.163 of 1988, an application under Rule 21 of Order XI to strike off the defence. The petition

was opposed by the appellant. He also filed an affidavit to the effect that he is not in possession of the document sought to be produced and therefore he is not in a position to produce the same. Disregarding the objection, learned Munsiff allowed that application and struck off the defence. Thereafter plaintiff was examined. Appellant was denied opportunity to cross examine the witnesses. Accepting the evidence a decree was granted. Appellant challenged the decree and judgment before first appellate court. It was contended that the trial court should not have struck off the defence and in any case should not have denied an opportunity to cross examine the witnesses. First appellate court rejected the contentions and dismissed the appeal. It is challenged in the second appeal.

3. Second appeal was admitted formulating the following substantial questions of law.

i)Were the courts below justified in invoking the powers conferred under Rule 21 of Order 11 of Code of Civil Procedure for non-compliance with an order for production of the document and striking off the defence

ii)Were the courts below justified in granting a decree without considering the genuineness of the plaint claim.

4. Learned counsel appearing for appellant and respondent were heard.

5. Learned counsel, relying on the decision of the Apex Court in **Babbar Sewing Machine Co. V. Tirlok Nath Mahajan (**AIR 1978 SC 1436) argued that courts below should not have struck off the defence for the failure of appellant to produce the document directed to be produced, in the absence of specific finding that there has been obstinacy or contumacy on the part of the appellant or any wilful attempt to disregard the order of the court. Relying on the decision of the Apex Court in **Modula India V. Kamakshya Singh Deo** (AIR 1989 SC 162)the learned counsel argued that even if striking off the defence was justifiable, the non granting of an opportunity to cross examine the witness examined on the side of the respondent was illegal and therefore the decree and judgment are unsustainable. Relying on the decision of a Single Judge of the High Court of Madras in **Chinnappan V. Ramachandran (**AIR 1989 Madras 314) and a Single Judge of Allahabad High Court in **Praveen Kumar V. VII Additional District Judge, Meerut** (AIR 1994 Allahabad 153) it was argued that the order to struck off the defence was illegal and for the failure to

produce the document directed to be produced invoking the powers under Rule 21 of Order XI was not justifiable and at best only an adverse inference could have been drawn.

6. The records of the trial court reveal that after issues were settled, respondent filed I.A.837 of 1987 on 12.10.1987 seeking an order for directing appellant to produce the registered sale deed, which according to the respondent is not a genuine deed. The orders in the application show that it was posted for objection and hearing to 19.10.1987 and thereafter as no objections filed, it was allowed. I.A.163 of 1988 was filed on 6.2.1988 contending that in spite of the order in I.A.837 of 1987, the document was not produced and therefore the defence of the appellant is to be struck off under Rule 21 of Order XI of the Code. The order in I.A.163 of 1988 shows that when that petition was pending, appellant filed an affidavit stating that he is not in possession of the document. But holding that non production of the document after seeking time to produce the same is not explained, the defence was struck off. There was no finding that the original order was passed as provided under the provisions of Rule 2 or 12 or 15 of Order XI or that appellant was guilty of either obstinacy or contumacy and therefore the

defence is liable to be struck off.

7. Rule 21 of Order XI enables court to struck off the defence if the party fails to comply with an order to answer the interrogatories or for discovery of inspection of documents. Rule 21 of Order XI reads:-

> "Non compliance with order for discovery:- (1) Where any party fails to comply with any order to answer the interrogatories, or for discovery of inspection of documents, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defendant, and the party interrogating or seeking discovery or inspection may apply to the Court for an order to that effect, and (an order may be made on such application accordingly, after notice to the parties and after giving them a reasonable opportunity of being heard),
> (2)Where an order is made under sub-rule(1) dismissing any suit, the plaintiff shall be precluded from bringing a fresh suit on the same cause of action.

8. The provisions of Rule 21 has to be exercised with care and caution and is to be the last resort. A plaint shall not be thrown out or the defence struck off without adequate reasons. The test laid down under Rule 21 is whether the default is

wilful. If it is on the part of the plaintiff it entails in the dismissal of the suit. Such an order ought not to be made unless court is satisfied that he was wilfully witholding information, refusing to answer the interrogatories or withholding the documents which he ought to discover. In such an event, plaintiff must take the consequence of having his suit dismissed. On the otherhand, if it is the case of the defendant his defence is liable to be struck off and he is to be placed in the same position as if he had not defended the suit. But it is settled legal position that court should exercise the stringent provisions only in extreme cases, where there is contumacy on the part of the defendant or a wilful attempt to disregard the order of the court. If there was no default much less any wilful default on the part of the defendant to comply with the order of the court, court is not to exercise the stringent power. Apex court in Babbar Sewing Machine Company's case(supra) held:-

> “It is settled law that the provisions of O.XI R.21, should be applied only in extreme cases where obstinacy or contumacy on the part of the defendant or a wilful attempt to disregard the order of the court is established. As pointed out by Lord Russell C.J in Reg.V.Senior (1899)1 QBD 283 and affirmed by

> Cave L.C in A.B.Tamboli V.G.I.P. Railway, ILR 52 Bom 169: (AIR 1928 PC 24) “Wilfully” means that: “the act is done deliberately and intentionally, not by accident or inadvertence, but so that the mind of the person who does the act goes with it”.

9. Apex Court considered the consequence of striking off the defence under Rule 21 of Order XI and whether a defendant has a right to cross examine the witness examined on the side of the plaintiff or to lead evidence when his defence is struck off in **Modula India's case**(supra). Their Lordships held that while it is true that in a broad sense the right of defence takes in within its canvass all aspects including the demolition of the plaintiff's case by cross examination of his witnesses, it would be equally correct to say that cross examination of plaintiff's witnesses really constitutes a finishing touch which completes the plaintiff's case. It was held:-

> “ It is a well established proposition that no oral testimony can be considered satisfactory or valid unless it is tested by cross examination. The mere statement of the plaintiff's witnesses cannot constitute the plaintiff's evidence in the case unless and until it is tested by cross-examination. The right of the defence to cross examine the

> plaintiff's witnesses can, therefore be looked upon not as a part of its own strategy of defence but rather as a requirement without which the plaintiff's evidence cannot be acted upon.

It was also held that granting of permission to the defendant to cross examine the witness is one thing and leading evidence in support of his own case is different. Their Lordships held : -

> “We therefore think that the defendant should be allowed his right of cross examination and arguments. But we are equally clear that this right should be subject to certain important safeguards. The first of these is that the defendant cannot be allowed to lead his own evidence. None of the observations or decisions cited have gone to the extent of suggesting that in spite of the fact that the defence has been struck off, the defendant can adduce evidence of his own or try to substantiate his own case”.

10. The order strucking off the defence show that the trial court did not consider the relevant aspects at all. The order without a finding that defendant was guilty of obstinacy or contumacy or wilfully disregarded the order of the court such an order could not have been passed, even if Rule 21 of Order XI of

the Code applies. Even if the strucking off the defence was justifiable, which in fact was not, denial of an opportunity to cross examine the witness examined by plaintiff was illegal. Even when the defence was struck off, defendant is entitled to cross examine the witnesses examined on the side of the plaintiff, though it will not enable him to lead evidence.

11. The crucial question then is whether on the facts of this case trial court was justified in striking off the defence under Rule 21 of Order XI of Code of Civil Procedure. To attract Rule 21, the party shall fail to comply with an order to answer the interrogatories or for discovery or inspection of documents. I.A.837 of 1987 was filed for a direction to the appellant to produce the document. It was not an application either to answer any interrogatories as provided under Rule 1 or for discovery of document as provided under Rule 12 of Order XI of Code. Even though Rule 11 was shown in that application, it is only an application filed under rule 14 of Order XI. The power provided under Rule 21 can be invoked only within the ambit of the said section. Such an order could be passed only if the court had earlier passed an order under rule 2 or 11 to answer the interrogatories, or an order under Rule 12 to make discovery on

oath of the documents or an order for inspection of documents under Rule 15, of Order XI of the Code. An order passed by the court to the defendant to produce such document in his possession is only an order under rule 14 of Order XI. Its non compliance will not visit the stringent order provided under rule 21 of Order XI of the Code. Rule 14 of Order XI reads :-

> "Production of documents:- It shall be lawful for the Court, at any time during the pendency of any suit, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such suit, as the Court shall think right; and the court may deal with such documents, when produced, in such manner as shall appear just".

Even though there was a misquoting of the provision of rule 11 of Order XI in I.A.837 of 1987, a reading of the petition makes it clear that it was only a petition under rule 14 for a direction to the defendant to produce a document on the allegation that it is in his possession . That petition was not for direction to the defendant to answer the interrogatories or an application for discovery on oath of the document or for an inspection of the document. Even though learned counsel appearing for

respondent vehemently argued that it was an application for discovery and the order was as provided under rule 12 of Order XI, I cannot agree. The order in I.A.837 of 1987 shows that it was only an order under rule 14. Unless the order passed by the court in I.A.837 of 1987 would come under any of the provisions, as provided under rule 21, court below could not have invoked the power provided under Rule 21 to pass an order striking off the defence. The records establish that I.A.837 of 1987 was filed neither to serve an interrogatory nor to discover the document nor for inspection of the document. Therefore the trial court should not have invoked the power under Rule 21 of the Code to struck off the defence.

13. An identical question was considered by a learned Single Judge of Madras High Court in Chinnappan's case (supra). Learned Single Judge, analysing the various provisions of Rule 11 held that the application directing the party to produce the document, as in the present case, is not an application contemplated under Rule 12 of Order XI or Rule 1 of Order XI and therefore the defence could not have been struck off under rule 21. The same position was followed by another Single Judge of Allahabad High Court in Praveen Kumar's case

(supra). I agree with the view expressed by the learned Judges in those decisions. Learned Munsiff on the facts of the case should not have struck off the defence for the non production of the document directed to be produced as per order in I.A.837 of 1987. At best, court could have drawn adverse inference for the non production of the document as directed. Hence the decree and judgment passed by courts below are set aside.

14. The second appeal is allowed. The decree and judgment passed by the learned Munsiff and confirmed by learned Sub Judge are set aside. O.S.191 of 1986 is restored to the file of Munsiff Court, Varkala and is remitted to the trial court for fresh disposal in accordance with law. Parties are directed to appear before the trial court on 30.7.2007.

M.SASIDHARAN NAMBIAR, JUDGE

lgk/-

M.SASIDHARAN NAMBIAR, J

S.A.NO.101/1994

JUDGMENT

19th JUNE, 2007